IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 729 OF 2006
IN
NOTICE OF MOTION NO. 2259 OF 2006
IN
SUIT NO. 1996 OF 2006

Ezra Aboody] .. Appellant (Ori.Defendant)

Versus

1. Mr. Humayun Dhanrajgir & 3 ors.] .. Respondents (Ori.Plaintiffs)

Mr. H.J. Thakkar, senior counsel with Mr. Abhay Shah & Ms. Jesal Shah i/b M/s. Daru Shah & Co. for the appellant.

Mr. Iqbal Chagla, senior counsel with Mr. Lynn Pereira i/b M/s. Federal & Rashmikant for the respondents.

CORAM: R.M. LODHA &
S.A. BOBDE, JJ.

DATED: 09TH OCTOBER, 2006

P.C. :

. The dispute centres around flat No.F34/34A of the building known as Dhanraj Mahal situate at CSM Apollo Bunder, Mumbai. The respondents (for short "the plaintiffs") are the owners of the said flat. On 1st March, 2002, *inter alia,* two agreements were entered into between the plaintiffs and the appellant (for short "the defendant"). One agreement is the Leave & Licence

agreement. By the said agreement, the defendant was permitted to occupy the said flat as licencee for three years. By the other agreement of the same date, an option to purchase the said flat was given to the defendant. The agreement provides for the time by which the option could be exercised. The defendant claims to have exercised the option to purchase the subject property after the expiry of 18 months of the Leave & Licence agreement and before the six months therefrom vide letter dated 23rd August, 2004. On the other hand, the plaintiffs say that the defendant is not entitled to exercise the option to purchase in view of the breaches committed by him. According to the plaintiffs, the defendant is guilty of the breaches communicated to him vide letter dated 2nd September, 2004, thus:

> "a) As you are aware for convenience all the agreed terms for giving use of the subject premises to you under leave and licence were recorded in two agreements both dated 1st March, 2002. One was between our clients individually and yourself and is what is termed the Leave & Licence Agreement and the other was an agreement termed as Maintenance Agreement entered into between our client H. Dhanrajgir Estates Pvt. Ltd. and yourself.
>
> b) The total compensation payable was in a sum of Rs.1,12,000/- subject to escalation of 5% each year as provided. The last amounts paid by you was a short paid amount of Rs.27,000/- and Rs.89,250/-, both in respect of September 2003, making an aggregate amount of rs.1,16,250/-. After 1st March, 2004 (with a further escalation of 5%

p.a.) you were liable to pay a sum of Rs.1,23,481/- per month in the aggregate.

c) From June/July 2003 onwards, you commenced committing serious breaches of the terms and conditions of Leave & Licence and Maintenance Agreement including illegal exploitation of the suit premises by trafficking therein (which details are to your knowledge and which we do not wish to elaborate here).

d) You failed to pay the licence compensation by the due date from May 2003 onwards and for September 2003 and thereafter, you have completely stopped payment. The licence compensation now in arrears from 1st October, 2003 upto 31st August 2004 is in a sum of Rs.13,28,886/- as per the statement annexed hereto."

2. The plaintiffs, however, in the said letter dated 2nd September, 2004 allowed the defendant to exercise the option provided he complied with the following:

"i) pay the entire amount of arrears of Rs.13,28,886/- (Rupees Thirteen lakhs twenty eight thousand eight hundred eighty six) to our clients within a period of one week from receipt of this letter together with interest at the rate of 18% per annum on the outstanding amounts since the date on which notice has been served upon you under the Interest Act; and

ii) pay the arrears of Rs.36,600/- (Rupees Thirty six thousand six hundred) with interest at 18% p.a. for the period September 2003 to June 2004 to Raja Dhangrajgir Estate within one week from the receipt of this letter; and

iii) deposit with Mr.Suresh Talwar, partner of M/s. Crawford Bayley & Company (being the

> Escrow Agreement holder) a sum of Rs.257,35,500/- (Rupees Two crore fifty seven lakhs thirty five thousand five hundred) being the total consideration payable by you for purchase of the subject flat within a period of four weeks from the receipt of this letter under intimation to us."

3. The correspondence ensued between the parties that highlighted the various differences between them.

4. It is pertinent to note that since September, 2003 the defendant has not paid anything to the plaintiffs for use and occupation of the subject premises. The plaintiffs, initially, filed a suit in the Court of Small Causes seeking vacant possession and payment of arrears of licence compensation and other charges. In that suit, the preliminary issue about the jurisdiction was framed and tried. By the judgment dated 9th June, 2006, the Court of Small Causes held that the suit was not triable by that Court. Then the present suit has been filed by the plaintiffs. *Inter alia*, the plaintiffs have prayed for declaration that there has been no valid exercise of the option to purchase the subject premises by the defendant in accord with the option to purchase agreement. The plaintiffs also prayed that it be declared that the defendant has no right, title or interest in the subject premises and

the defendant be directed to hand over vacant and peaceful possession thereof to the plaintiffs. The plaintiffs claimed mesne profits at the rate of Rs.50,000/- per day from 23rd August, 2004 until actual delivery of possession to the plaintiffs.

5. In the suit, the plaintiffs took out Notice of Motion praying for appointment of Court Receiver and restraining the defendant from parting with possession of the subject premises to any third party.

6. The defendant contested the Notice of Motion by filing reply Affidavit.

7. It appears that on 28th July, 2006, when the matter appeared before the Motion Judge, the counsel appearing for the parties agreed that the conveyance in respect of the subject premises would be executed within four weeks from that date. That was not done. On 1st September, 2006, when the matter again came up before the Motion Judge, on behalf of the defendant the contention was raised that while executing the conveyance, the plaintiffs must obtain permission of the Bombay Port Trust. Before the learned Motion Judge, on behalf of the plaintiffs it was submitted that under the agreement with the Bombay Port Trust, there is no

restriction for creating sub-lease in favour of the defendant and that the permission of the Bombay Port Trust is not necessary. It appears that the plaintiffs showed their willingness to give an indemnity in case the defendant was not satisfied.

8. In the backdrop of these submissions, the Motion Judge directed that the conveyance shall now be completed within a period of two weeks from 1st September, 2006 with whatever indemnity clause is put in the conveyance. On failure to do so, the learned Motion Judge granted relief in terms of prayer clause (b) of the Notice of Motion i.e. ordering the appointment of Court Receiver in respect of the suit premises. The learned Motion Judge further directed that the Court Receiver, though shall take possession of the subject premises, the defendant shall not be dispossessed if he deposits the amount of consideration in the Court. It was further directed that in case the Receiver is not required to take possession, he shall fix the amount of monthly compensation to be paid by the defendant for occupation of the suit premises within two weeks thereafter.

9. The order passed by the learned Motion Judge on 1st September, 2006 is impugned in the present Appeal

at the instance of the defendant.

10. We heard the senior counsel for the parties for quite some time.

11. In our considered view, the order of the learned Motion Judge cannot be faulted insofar as the appointment of the Court Receiver in respect of the subject premises is concerned. We may briefly indicate the reasons therefor. Admittedly, the defendant was inducted in the subject premises as licence under the Leave & Licence agreement dated 1st March, 2002. On that very day, further to leave and licence agreement, by another agreement, an option was given to the defendant to purchase the subject property within time provided therein. On the one hand, the defendant claims to have exercised the option in accordance with the option purchase agreement after the expiry of 18 months of the Leave & Licence agreement, but before expiry of six months therefrom, the plaintiffs case, on the other hand, is that the defendant having committed breaches of the Leave & Licence agreement, he forfeited his right of option to purchase the property. There is not much dispute before us that from the month of October, 2003,

no payment has been made by the defendant to the plaintiffs, though the defendant continues to be enjoying the plaintiffs' property. The consideration under the option purchase agreement has not been paid by the defendant to the plaintiffs. Despite the fact that the Motion Judge gave an opportunity to the parties to have the conveyance deed executed, they failed to do so.

12. The senior counsel for the defendant submitted that the conveyance deed could not be executed as the plaintiffs failed to honour their statement of indemnity made before the learned Motion Judge. Mr. Iqbal Chagla, the senior counsel for the plaintiffs handed in the draft of the conveyance deed (sub-lease). Clause 8 thereof reads thus:

> "8. The Sub-Lessor shall and will from time to time during the term of the Sub-Lease, indemnify and keep indemnified the Sub-Lessee against all actions, suits, proceedings that may be taken and the costs, charges and expenses in relation thereto or claims or demands that may be made by the Mumbai Port Trust in relation to the execution of the Sub-Lease herein without the permission of the Mumbai Port Trust (which according to the Sub-lessor, is not necessary under the Head Lease terms and similar Sub Lease Deeds have been executed since 1991 onwards).

13. Though the case of the defendant is that the indemnity incorporated in the draft deed is not as per

the statement made before the learned Motion Judge, upon perusal thereof, we are of the *prima facie* view that indemnity recorded in the draft conveyance deed must have satisfied the defendant.

14. The order appointing Court Receiver, in the facts and circumstances of the case, is accordingly justified.

15. Though we have maintained the order of appointment of Court Receiver, in our considered view, the learned Motion Judge was not justified in directing the defendant to deposit the amount of consideration as per the option purchase agreement i.e. Rs.2,57,35,500/- and also the payment of monthly compensation if he wanted to remain in occupation of the subject premises. Since the plaintiffs have prayed for declaration that it be declared that defendant has not exercised his right of option to purchase the suit premises in accordance with the option to purchase agreement, we are of the view that as of now it is not justified to ask the defendant to deposit the amount of consideration. However, if the defendant wants to remain in occupation of the subject premises, he could be permitted to remain in possession as an agent of the Court on payment of the security and monthly royalty as per our operative order.

16. We are informed that an amount of Rupees one crore has been deposited by the defendant pursuant to the order dated 28th September, 2006. We are also informed that an amount of Rupees twelve lacs is lying with the plaintiffs towards security deposit. These aspects shall be taken care of us in our operative order.

17. In what we have discussed above and taking into consideration all facts and circumstances of the case, we dispose of the Appeal by the following order:

(1) The order dated 1st September, 2006 appointing Court Receiver in respect of the subject premises is confirmed.

(2) The Court Receiver shall initially take formal possession of the subject premises and give an option to the defendant to remain in possession of the subject premises as its agent on the monthly royalty that may be fixed by the Court Receiver.

(3) If the defendant expresses his

willingness within two weeks from today to remain in possession of the subject premises as an agent of the Court Receiver, the Court Receiver shall get the necessary documents executed from the defendant and fix the royalty as early as possible and in no case later than six weeks from the receipt of such written communication from the defendant.

(4) The amount of Rupees one crore deposited by the defendant with the Registry of this Court shall be transferred to the Court Receiver without any delay. Out of Rupees one crore, Rs.50,00,000/- (Rupees fifty lacs) shall be kept apart as security and invested in Fixed Deposit of any Nationalised Bank by the Court Receiver. No further security shall be demanded by the Court Receiver from the defendant.

(5) Out of the remaining Rs.50,00,000/- (Rupees fifty lacs) and after adjusting the amount of Rs.12,00,000/- (Rupees twelve lacs) already lying with the plaintiffs by way of security deposit, the Court Receiver shall make the payment of the amount to the

plaintiffs calculated at the rate of Rs.1,30,000/- per month from 1st October, 2003 until 31st October, 2006 towards use and occupation by the defendant.

(6) The tentative royalty at the rate of Rs.1,30,000/- for the month of November, 2006 and subsequent months, until final determination of the royalty (monthly compensation) shall be paid by the Court Receiver to the plaintiffs until the remaining amount of Rs.50,00,000/- (Rupees fifty lacs) is exhausted.

(7) Upon determination of the monthly compensation, from the month of November, 2006, any shortfall will also be paid to the plaintiffs by the Court Receiver from the aforesaid amount.

(8) Upon exhaustion of the amount of Rs.50,00,000/- (Rypees fifty lacs), the defendant shall deposit the royalty every month with the Court Receiver and the Court Receiver shall accordingly pay that amount to the plaintiffs.

(9) In case the defendant fails to give his willingness in writing within two weeks from today or execute the agency agreement or commits one default in payment of royalty (monthly compensation) as may be determined by the Court Receiver from the month of November, 2006, the Court Receiver shall dispossess the defendant from the subject premises and put the plaintiffs in possession of the said premises as its agent without royalty and security.

. Needless to say, the order being interim, it's efficacy shall last until the disposal of the suit.

Sd/-
[R.M. LODHA, J.]

Sd/-
[S.A. BOBDE, J.]